



August 31, 2000

Mr. Russell W. Malm
County Attorney
County of Midland
200 West Wall Street, Suite 104
Midland, Texas 79701

OR2000-3386

Dear Mr. Malm:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 138569.

The Midland County Sheriff (the "Sheriff") received a request for all records relating to 1. Deputy Sheriff James Dennis McFadden and 2. the allegations made against Mr. McFadden by Jonathon Sloan Kepple which are the basis for the criminal proceeding in case number Cr 24736. You state that the Sheriff has no records relating to the allegations against Mr. McFadden because you say the Grand Jury rather than the Sheriff investigated the allegations. You claim that the remaining requested information is excepted from disclosure in its entirety under section 552.103 of the Government Code. You claim that portions of the requested information are excepted from disclosure under section 552.102 of the Government Code.

Before we consider the exceptions you raise, we must address the question of the Sheriff's compliance with the Act's procedures. When a governmental body seeks an open records ruling about whether it can withhold requested information, the Act requires the governmental body to submit to the attorney general copies of the requested information or representative samples of the information if the records are voluminous. Gov't Code § 552.301(e)(1)(D). The attorney general must receive this submission within 15 business days of the date the governmental body received the request for information. You state that the Sheriff received the request on June 13, 2000. The fifteenth business day after June 13th is July 5th. The postmark on the submission is July 7, 2000. *See id.* § 552.308. Thus, the

Sheriff has failed to comply with section 552.301(e)(1)(D). Consequently, the information is presumed to be public and must be released unless a compelling reason to withhold the information exists. *See id.* § 552.302. Such a compelling reason exists when information is made confidential by law. *See* Open Records Decision No. 150 (1977). However, this office does not consider the applicability of section 552.103, the litigation exception, to be a compelling reason to overcome the presumption of openness. *See* Open Records Decision No. 473 (1987). We therefore find that the Sheriff has waived its section 552.103 claim in this instance.

We will consider whether the information is deemed confidential by law. Portions of the submitted information are made confidential by one of the following statutes: sections 552.117(2), 552.130, and 411.083 of the Government Code; section 1701.306 of the Occupations Code; and section 6103(a) of title 26 of the United States Code.

Section 552.117 of the Government Code reads in relevant part as follows:

Information is excepted from [required public disclosure] if it is information that relates to the home address, home telephone number, or social security number, or that reveals whether the following person has family members:

- (2) a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, regardless of whether the officer complies with Section 552.024[.]

Gov't Code § 552.117(2). Section 552.117(2) requires you to withhold the home address, home telephone number, social security number, and information about family members pertaining to Mr. McFadden and other peace officers. We have marked the submitted documents to indicate the information that is subject to section 552.117(2).

The submitted documents include information excepted under section 552.130 of the Government Code. This section governs the release and use of information obtained from motor vehicle records, and provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Gov't Code § 552.130. You must withhold from public disclosure the copy of the driver's license, driver's license numbers, and the license plate numbers based on section 552.130. We have marked the documents accordingly.

The submitted information contains declarations of psychological and emotional health and medical condition from the Texas Commission on Law Enforcement Officer Standards and Education. Section 1701.306 of the Occupations Code provides as follows:¹

(a) The commission may not issue a license to a person as an officer or county jailer unless the person is examined by:

(1) a licensed psychologist or by a psychiatrist who declares in writing that the person is in satisfactory psychological and emotional health to serve as the type of officer for which a license is sought; and

(2) a licensed physician who declares in writing that the person does not show any trace of drug dependency or illegal drug use after a physical examination, blood test, or other medical test.

(b) An agency hiring a person for whom a license as an officer or county jailer is sought shall select the examining physician and the examining psychologist or psychiatrist. The agency shall prepare a report of each declaration required by Subsection (a) and shall maintain a copy of the report on file in a format readily accessible to the commission. *A declaration is not public information.*

Occ. Code § 1701.306 (emphasis added). We have marked the information that is subject to section 1701.306 of the Occupations Code. This marked information must be withheld under section 552.101 in conjunction with section 1701.306 of the Occupations Code.

The submitted information appears to include criminal history record information ("CHRI"). Criminal history record information generated by the National Crime Information Center ("NCIC") or by the Texas Crime Information Center ("TCIC") is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information

¹The Seventy-sixth Legislature enacted section 1701.306 of the Occupations Code and repealed section 415.057 of the Government Code without substantive change.

as provided in chapter 411, subchapter F of the Government Code. *See* Gov't Code § 411.083.

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Other entities specified in chapter 411 of the Government Code are entitled to obtain CHRI from DPS or another criminal justice agency; however, those entities may not release CHRI except as provided by chapter 411. *See generally id.* §§ 411.090-.127. Thus, any CHRI generated by the federal government or another state may not be made available to the requestor except in accordance with federal regulations. *See* Open Records Decision No. 565 (1990). Furthermore, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411, subchapter F. We note that DPS must provide the person who is the subject of the CHRI with access to his or her own CHRI. Gov't Code § 411.083(b)(3). We have marked the CHRI that must be withheld.

Title 26, section 6103(a) of the United States Code renders tax return information confidential. "Return information" is defined by federal law to include:

a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, over assessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense.

26 U.S.C. § 6103(b)(2)(A). We have marked one document we consider to be "return information." Section 552.101 excepts from required public disclosure information that is made confidential by law, including information made confidential by statute. Thus, the Sheriff must withhold from disclosure the confidential "return information" based on section 552.101 in conjunction with federal law.

Section 552.101 also applies to information made confidential by the common law right of privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Under the *Industrial Foundation* case, information is excepted from mandatory disclosure under section 552.101 as information deemed confidential by law if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* Mr. McFadden's credit report is private information that the Sheriff must not release to the public. Gov't Code § 552.101. We have also marked additional private information that the Sheriff must not release.

Our conclusion under section 552.101 and the common law right to privacy disposes of the Sheriff's section 552.102 claim. The test to be applied to information claimed to be protected under section 552.102 is the same test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common law privacy as incorporated by section 552.101.

In summary, the Sheriff may not withhold the submitted information based on section 552.103. The Sheriff must withhold from public disclosure the peace officer home address, home phone number, social security number, and family member information; the motor vehicle information; the psychological declarations; any criminal history record information; the tax return information; the marked private information; and the credit report. The Sheriff must release the remaining information.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kay Hastings".

Kay H. Hastings
Assistant Attorney General
Open Records Division

KHH/ljp

Ref: ID# 138569

Encl. Marked documents

cc: Ms. Jennifer Wright
Thompson, Coe, Cousins & Irons, L. L. P.
200 Crescent Court, 11th Floor
Dallas, Texas 75201
(w/o enclosures)